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Articles

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JUDGES AND LAWYERS IN AFRICA TODAY: THEIR POWERS COMPETENCE AND SOCIAL ROLE*

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1. INTRODUCTION: PUTTING "HONOURABLE JUSTICES" AND "LEARNED GENTLEMEN" IN HISTORICAL AND CLASS CONTEXT

Judges and legal practitioners, both public and private, in independent African countries have clamoured and continue to clamour, not only for societal recognition and acceptance of the hallowed ideal of "independence of the judiciary", but also for societal recognition and acceptance that judges and legal practitioners are, and should be, collectively the custodians of justice, law and good order in society.

Although the central task of my contribution is to examine the independence of judges and lawyers through the organizational and jurisdictional aspects of judicial processes, I consider it fundamental to make some preliminary observations which may help us put whatever we are doing in a correct historical and social context. In doing this, my purpose is to try to prove that it is socially and politically imperative in this period of our development that lawyers and judges learn to and do distinguish between the *inalienable primary duty of all of us who live in class-divided societies to be consciously partisan in class struggles* on the side of social equality, freedom and justice and the secondary but nonetheless important ideals of institutional and professional independence of judges and lawyers. The over-whelming majority of judges and lawyers in capitalist societies, whether in the imperialist states, in colonies or neo-colonies, have tended to treat the institutional and professional independence of judges and lawyers as an end in itself rather than one that should be in the service of liberating the greater ideals of the majority of the toiling and impoverished masses in society. In this regard then, I consider that in reality judges and lawyers have been promoting their own class ideals and not that of the larger part of society whom they claim to be representing.

It is in promotion of the narrowly conceived ideals of institutional and professional independence of the legal profession that justice was and still remains blindfolded. This indeed leads to serious contradictions when on the one hand the human side of us sees clearly that laws cannot be interpreted and applied outside of their social, historical and class context while on the other hand one yearns to promote the narrow institutional and professional ideals that contradict the former. An example which I can readily use to illustrate this point is that

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which I observed in the work of the Honourable Mr. Justice E. Dumbutshena, the Chief Justice of Zimbabwe. In 1985 in a moving speech[1] the Honourable Chief Justice said:

> "The Courts are caught between two needs: The need to preserve our natural resources and the need to do justice to society as well as to the offender.
>
> What does a magistrate do when he has been informed that the man appearing before him has nothing to eat . . . The hard facts are that most people we deal with are poor peasant farmers. Sometimes conditions of drought fall on them. They have to eat. They are in need of food. They need firewood and everything else. And they break laws which, in any event, they do not know or understand . . .
>
> Laws cannot succeed in encouraging hungry people to starve to death in order to preserve wild animals. People will not stop cutting trees to get firewood if there is nothing else to make fire with.
>
> To succeed in the conservation of our natural resources we must plan for rural economic growth. The rural population must be moved out of its depressing environment. There must be something to burn instead of felled trees. There must be plenty of food to eat. There must be sufficient money . . .

In contrast, however, the Chief Justice while asserting the right of judicial review of Ministerial (executive) decisions, in a recent detention case[2] said:

> "It is necessary to say that cases of detention involve the liberty of the individual, no matter who that individual is. I would like to repeat and thus endorse what LEON AXE J said . . ."Firstly it is perhaps necessary to remind oneself, from time to time that *the first and most sacred duty of the Court .. is to administer justice to those who seek it, high and low, rich and poor, Black and White.*" (emphasis added).

What I am pointing out here is not the fact that the Chief Justice considered in the above case that the liberty of individuals should be safe-guarded by the Courts but rather the ideology that justice ought to and can cut across social class

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1 Speech by the Honourable Mr. Justice Dumbutshena, Chief Justice, delivered at the International Workshop on the Implementation of a National Conservation Strategy at the Harare Sheraton on 4 November 1985, pp.22–24.

2 *The Minister of Home Affairs and the Director of Prisons v J.V. Austin and K.N. Harper*, Judgment No. S.C.79/86, Civil Appeal No. 237/86 (unreported). (pp.24–25 of the cyclostyled copy of the Judgment).

considerations while in his speech quoted above he was leaning towards debunking this privileged ruling class ideology in the administration of law. Independence of the judges and lawyers that attempts to make them blind to social class differentiations and how these determine justice and not the eloquence of arguments in court of heart-touching judgment should be exposed and rejected.

It is clear to me that there are a number of historical and social factors that have led the mainstream of lawyers to believe in and try to institutionalize the concept of independence of judges and lawyers outside of social class considerations.

Historically lawyers as professionals are a very recent phenomenon that date back to only a few centuries ago in the era of feudalism and, more so, capitalism. Early lawyers were members or confidants of the ruling aristocratic class. They were part of the rich exploiting families. The bourgeois revolution democratized society in tearing apart most of the feudal privileges and this led to new salaries or waged professionals specializing in law and its administration. A few members from the middle classes and even fewer from the peasantry and the working class joined the old lawyers from the ruling classes.

These "outsiders" became more or less privileged paid servants of the capitalist ruling classes. This material and social position in society dominated by a few wealthy people demanded that they should be "independent", that is, ready to serve any capitalist and to give the capitalists equal treatment. The ideas and economic reasons for the development of "independence of the judiciary" doctrine were, therefore, tied to ideals of free competition among the capitalists as a class and were extended to the whole society knowing very well that the millions of dispossessed workers, marginalized peasants and millions of the unemployed had no competing chance at all.

Thus law courts and the judicial processes were commoditized — ready for purchase and sale with those with economic power enjoying and benefiting from the services of "independent" judges and lawyers. No matter how much philanthropic *pro deos* and *in forma pauperises* the cynical bourgeoisie and other honest "friends of the people" engaged in, the inequality of legal justice under capitalism remained, remains and will remain chained to social inequality in the control of production and distribution of material wealth under capitalism.[3]

As if the purchase of legal services are not enough burden on the majority of the working and unemployed people, the content of law itself reflects and reinforces social inequality. Special legal language, complicated formalities, special procedural requirements such as rules of evidence requiring certain

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[3] S.B.O. Gutto, "The Political Economy of Legal Aid and Advice Services", *Z L Rev., Vol. 3.* 1985 (Nos. 1 and 2).

degrees of proof and different levels of proof in criminal and civil cases, restrictions on parties who may participate in adjudication or disputes, threatening appearance of judges and lawyers in wigs and robes, all contribute to the tyranny and dictatorship over the masses. It is no wonder then that when a people's revolution takes root[4] and progresses,[5] although under extreme hardships of counter revolution engineered by imperialism, as has happened in the People"s Republic of Mozambique, the land of the people's martyr, Samora Machel, not only is the bourgeois controlled wealth liberated and new relations of production instituted, a new people-based judicial system evolves and is progressively consolidated.

To summarize the message of this introductory explanation, I quote the words of the revolutionary martyr Samora Machel, whom we are still mourning but who lives in his ideas:

> "As men, as a country, as a state, we must always choose which side we are on: on the side of a privileged handful, with the people against us, or on the side of the people, with a dethroned privileged handful against us."[6]

From purely liberal positions, scholars have now fully exposed the class role of the judges in advanced capitalist societies.[7] To try and demand reforms to make them "independent" without socially transforming society is only to strengthen their effectiveness as agents of the minority ruling classes under capitalism.

It is my hope that this historical sketch will contribute towards orientating us to re-examine the ideological assumptions underlying the doctrine of "independence of judges and lawyers" in class divided societies so that we make the doctrine a tool for struggle in the service of the greater section of humanity, the working popular masses. We must consciously choose which side we are on for even if we do not do so consciously the people do and will know where we belong.

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4 See, generally, A. Sachs (ed.) *Principles of Revolutionary Justice* (London, Mozambique, Angola and Guinea Information Centre, 1979).

5 Gita Honwana-Welch, "Legal Pluralism in the Perspective of Popular Justice : "The Mozambican Experience" (unpublished paper, 1985); A. Sachs, "Changing the TErms of the Debate : A Visit to a Popular Tribunal in Mozambique", 1984, *JAL, Vol.28*, Nos. 1 and 2, p.99.

6 Samora Moises Machel, *Our Sophisticated Weapon* (Maputo, Dept. of Information and Propaganda, 1982), p.11.

7 See, for example, Griffith, The Politics of the Judiciary, 2nd Ed., Fontana, 1981, Paterson, "Judges: A Political Elite?" (1974) *Vol. 1, No. 2, British Journal of Law and Society*, 118.

2. THE HANDLING OF MATTERS OF JUDICIAL NATURE BY "APOLITICAL", "PROFESSIONAL" JUDGES AND ORDINARY COURTS OF LAW: WHAT IMPLICATIONS FOR THE INDEPENDENCE OF JUDGES?

One of the most surprising beliefs of advocates of the traditional, as opposed to the revolutionary, doctrine of independence of the judiciary is that which views judges as "professionals" and, by implication, that judges are, therefore, removed or should be removed, from the political process in their work to a large extent. This belief ignores the reality that *to a large extent judges are political appointees* who begin their career as judges upon appointment and not by virtue of competitive professional examinations and job interviews. (This, to some extent, however, is the case in relation to judges in the lower courts, such as magistrates.)

In practically every other constitution of independent African countries, whether the constitution is inherited from the former colonizing power or is locally promulgated, judges at the higher levels are appointed by political leaders such as Presidents, Prime Ministers or Party Central Committees with or without the advice of Judicial Service Commissions themselves composed of political appointees.[8] Through and through judges are in reality creatures of politics and politicians and attempts through the law[9] or otherwise to claim that they can, upon assuming their offices, distance themselves from politics are not realistic. The question is really that of *whose politics* and not whether or not they ought to participate in politics. Since politics is concrete expression of class struggles, the class in power will decide the politics of the judge. Complications do, however, arise where there are multi-parties which exchange leadership every once in a while like we find in imperialist U.S.A., Britain, France, West Germany, etc. but this problem is minimized by the fact that nowhere in the world is there a situation where political parties representing *different and antagonistic class interests* exchange leadership except under a revolution in which case the class in power does not renounce its dominance willingly and peacefully.

Multi-parties representing *the same class interests* do cause problems for the judge and here some form of neutrality in Party struggles on agreed values is possible but nonetheless dangerous to the judge. However, a revolutionary judge representing the interests of the working people may work under a bourgeois state only as a way of using the courts to politically educate the masses and occasionally to undermine bourgeois interests but this cannot go on for a long time before the bourgeoisie discover and unleash their wrath on the judge. This illustrates the point that "independence of the judges" in the revolutionary sense can only be possible when there is a revolution and that the traditional form of

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[8] See, for example, *Constitution of Zimbabwe*, Articles 84–85, 90.

[9] See legal provisions directed at prohibiting all judicial officers from participation in politics in Zimbabwe : Public Service Officers (Discharge and Misconduct)(Amendment) Regulations 1985 (No. 2), S.I. 135/1985 made under Article 75 of the Constitution of Zimbabwe.

"independence of the judges" is observed by the bourgeoisie only where the judges are seen to be promoting bourgeois values. Of course, the reverse is also true. Independence of the judges under socialism is conditioned by socialist legality and politics which are dominated by the interests of the working people which are antagonistic to those of capitalism and bourgeois values.[10] A judge with bourgeois values cannot be elected to serve the interests of the working people under socialism and socialist institutions. Here we see the fundamental difference between socialist and capitalist judicial processes: that under socialism the judicial process expresses and promotes the class needs and interests of the majority while under capitalism the judicial process expresses and promotes the class needs and interests of the minority ruling bourgeoisie and the upper section of the middle-classes.

The reasons why judges depend so much on the political ruling forces are not only based on the fact of appointment of judges and the class values of the judges. Also of importance is that the enforcement of legal decisions within a state is assigned to organs other than the judiciary. The effectiveness of law, therefore, depends on unity of purpose of the judicial and executive organs of the State. Judicial observations in two recent Zimbabwean cases illustrate this point.

In a case where the Commissioner of Police refused to give protection to a messenger of court to serve a writ on squatters occupying underutilized privately owned land after a court ordered that they be evicted, Mr. Justice Waddington said:

> "If the Messenger were not to be entitled to help from the police to give effect to writs and other process of the Courts in cases where he alone cannot do so, it could be quite pointless for an aggrieved citizen or visitor to Zimbabwe to seek the protection of his rights by the State through the medium of the Courts."[11]

In *Minister of Home Affairs and The Director of Prisons v J.V. Austin and K.N. Harper*, Chief Justice Dumbutshena said:

> When the Executive ignores the orders and judgments of the Courts there is the inevitable break-down of law and order, resulting in uncivilized chaos because the courts cannot enforce their own orders. Their jurisdiction and duty end after the delivery of judgment."[12]

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10 V. Terebilov, *The Soviet Court* (revised ed.) (Moscow, Progress Publishers, 1986) Chaps. 1 and 2.

11 Cited with approval by Gubbay, J.A., in an appeal in *The Commissioner of Police v R.S. Rensford and Messenger of Court, Gweru*, Judgment No. S.C.30/84, Civil Appeal No. 341/83, cyclostyled copy (unreported) p.5.

12 *Supra*, note 1, p.5 of Judgment.

3. ORDINARY COURTS, SPECIAL COURTS AND PROFESSIONAL JUDGES AND LAWYERS

The next area for our consideration concerns the generally assumed desirability of ordinary courts presided over by "professional" judges to handle most, if not all, of matters of judicial nature.

Having demonstrated that the role of judges is really political and class determined and that, therefore, independence of the judges should be viewed in this context, the question whether ordinary courts and "professionally" trained judges alone should be the proper organs for dispensing political and class-based justice is naturally contentious.

For one, it is a historical fact that most societies have long departed, in practice, from the view that traditional law courts and judges are the best institutions for dispensing legal justice, or deciding fairly on disputes of a legal nature. The existence of institutions such as labour (industrial) relations boards and tribunals,[13] which act as lower courts and the high courts respectively, in disputes between employers and workers is a clear illustration of the fact that the ruling classes in society have seen merit in institutions that are generally termed "administrative tribunals" and that their social interests are better promoted through these institutions and not in ordinary courts. The movement of the establishment of ombudsmen,[14] which obviously deal with grievances and disputes that could easily be dealt with by ordinary courts if the scope of justiciable interests were expanded further contributes to the reality that ordinary courts and professional judges with their narrowly conceived professional and institutional "independence" and "impartiality" are seriously under question.

Of course, some of the non-court disputes settlement institutions deal with matters that do not necessarily amount to disputes which have been lifted to the level of legal disputes but the point still remains that a lot of what they do could easily be the subject of ordinary judicial processes if the courts as currently constituted were viewed to be playing meaningful roles in dispute settlements.

Also of significance is the fact that in many jurisdictions, the lower courts where most legal disputes are determined and finalized are not presided over by highly "professional" personnel. This is true of such courts during colonial rule[15] and after independence.[16] The reason why lowly trained personnel decide legal dispute in lower courts may be partly because of financial considerations. However, the fact that society has come to accept this as normal and not as a lowering of the quality of justice illustrates the point that what is acceptable in society as proper is historically determined. It is not a simple professional

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13 See, for example, *Labour Relations Act*, No. 16, 1985 (Zimbabwe) Parts XI and XII.

14 Articles 107 and 108 of *Constitution of Zimbabwe* and the *Ombudsman Act* No. 16, 1982.

15 Rhodesian *African Law and Tribal Courts Act*, Chap. 237; *Magistrate's Court Act*, Chap. 18.

16 Zimbabwean *Customary Law and Primary Courts Act*, No. 6 of 1981.

question although it is important that those who administer the law ought to know the law and the class nature of the society that law is operating in.[17]

What needs to be guarded against is sacrificing the less alienating character of judicial processes in the process of increased professionalization of the lower courts. We have already seen how "professional" courts terrorize the masses through language complications, intricate procedures, intimidating appearances of judges etc. This should not only be corrected in the higher courts but efforts must be made to ensure that lower courts do not degenerate to the present levels of the higher courts.

More importantly, the lower courts as well as the higher courts must be revolutionized along with the rest of society if "independence of the judges and lawyers" is to mean anything positive and beneficial to the masses. There is a tendency at independence to try and re-discover the customary past and in the process forget that the majority of the substances in customary laws were class based. Most societies in Africa were divided into classes (although not of a capitalist nature) long before formal colonization. In combatting social exploitation, inequality, obscurantism, patriarchal domination, etc., etc., we need to deal with all forms — whether capitalist or pre-capitalist. Traditional customary law and courts must not be used as centres for reviving past exploitative and oppressive practices. They can only play progressive roles if used to fight past systems of inequality and to promote the best values that are in line with the future we want to build.

Indeed, the non-court disputes settlement institutions, the ordinary courts, the lay persons and the professional lawyers who sit in these institutions and courts can only be with the *masses and for the masses* when the masses have captured political power — as they did in Mozambique[18] — and become the ruling force in society. It is then that t he ordinary courts and special institutions of judicial character can reflect the needs and interests of the majority. The law and its administration then becomes liberated from monopoly and direction of the minority exploiting classes. Independence of the judges and lawyers, who would then be of the people and from the people and not trained mercenaries for carrying out minority interests, will then be realized and respected by the people.

In other words, the organization and re-organization of the courts should be geared towards making court fora where matters relating to the promotion of society's well-being, eradication of poverty and social inequality are being discussed and contradictions arising from such liberatory process resolved. This demands popularizing the judicial process by *making judges and lawyers accountable to the people* and also ensuring that more and more people are involved in the disputes settlement process and not simply litigants, the accused

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[17] S.B.O. Gutto, "Law and legal education in the period of transition from capitalism to socialism," *Z.L. Rev., Vol 1 and 2*, (1983–84) 158 at 166.

[18] Notes 4 and 5, above.

and prosecutors or narrowly defined witnesses as if they live outside of the society where they live and work. It is under such conditions that judges and lawyers would be independent of and from the corrupting influence of sectarian party politics, and dominating influence of money, primitive ideology and pressures for accumulation of private wealth, narrow religious dogmas and similar social evils.

4. COURTS, PETITIONS FOR PERSONAL FREEDOM AND SECURITY OF INDIVIDUALS AND THE INDEPENDENCE OF JUDGES AND PROSECUTORS

The ordinary courts in capitalist oriented African States which deal with most criminal cases have, by and large, used every occasion possible to assert what they consider to be their primary role of upholding ideals of personal freedom and security of individuals as well as protecting private property. It is in this sphere that courts and many ideologues of the traditional doctrine of independence of the judiciary have tried very much to distance the courts from the executive and legislative organs of the State, even though, as we have seen, the courts are themselves political creatures of those very same executive and legislative political organs of the State.

In Zimbabwe, the High and Supreme Courts have since independence tended to interpret the law and assess situations in ways that favour individual freedom and protection of private property much more than the courts did during the colonial time.[19] So much has this tendency been expressed by the courts that a colleague of mine and I have commented and denounced what appeared in a particular case to be deliberate promotion of imperialist and neo-colonialist interests of the courts.[20] In one instance the Supreme Court in deciding the case of a fugitive from justice even asserted that:

> "Bickle, even if he were an outlaw, would be entitled to seek protection of the Court from the action taken against him and his property."[21]

The Courts in Zimbabwe have, therefore, been consistent in asserting their right to handle matters of judicial nature touching on personal freedom and security of the individual and private property even in cases where the executive

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19 John Hatchard, "Breach of Constitutional Safeguards in Preventative Detention Cases", *Z.L. Rev., Vol. 3* (1985).

20 S.B.O. Gutto and K. Makamure, "Judicial Subversion Under the Cloak of Legality? The Judgment in The Minister of Home Affairs v Bickle and Three Others, *Z.L. Rev., Vol. 3* (1985). (This relates to the case reported in 1984 (2) SA 439 and not that in 1983 (2) SA 457).

21 *Minister of Home Affairs v Bickle*, 1983 (2) SA 457 (ZSC) at p.464; P. Nherere, "When is a fugitive not a fugitive" — Some Observations on Minister of Home Affairs v Bickle", *Z.L. Rev., Vols. 1 and 2*, (1983–84) p.267.

arm of the State has not been pleased with[22] or has proceeded to ignore,[23] sometimes justifiably, court decisions in such circumstances. The courts have also asserted the right of detainees to apply to court for *mandamus* orders on the detaining authority so that adequate reasons for detention are given to the detainees.[24] The courts have also asserted that it is their duty to ensure that the detaining authorities should act fairly to the detainees and that whether or not the executive is given discretion on the matter by the law this does not remove the duty of the courts to review the executive action.[25]

The position adopted by the Zimbabwean courts after independence contrasts greatly with that taken by the Kenyan courts.[26] The Kenyan courts have leaned more towards effecting orders from the executive organs of the State on how they should make decisions in cases considered "political" by political leaders. For example, before a trumped-up charge was abandoned and Willy Mutunga, the accused, was detained in 1982, Justice Sachdeva (as he then was) refused to give bail to the accused charged with sedition stating categorically *before the case was heard* that:

> "Courts do not operate in a vacuum and cannot be oblivious of the fact that some subversive elements have unfortunately crept into the University and the State cannot simply ignore them."[27]

Apart from prejudging the issues, the judge conveniently ignored legal authorities on granting of bail submitted by the defence lawyers[28] while paying singular attention to submissions of the prosecution — the latter simply voicing demands of the political leaders. Currently, a political prisoner, Maina-Wa-Kinyatti, is going blind in jail despite repeated applications to the courts and other authorities to demand that he is given medical treatment.

From the foregoing, it becomes clear that the relative higher level of independence of the judiciary in Zimbabwe compared to Kenya is useful but that usefulness can only be in the interest of the larger society if it is not used to secure

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22 See, for example, speech delivered on 13 July 1982, to the House of Assembly on the Renewal of the State of Emergency by the then Minister of Home Affairs, Cde. H. Ushewokunze.

23 See notes 2, 11 and 12 above. In the *Rensford case* (note 11) the executive organ of the State, acting under legislative powers vested in it by the legislature, promulgated regulations which allowed the squatters to remain on the land they had illegally occupied with the State paying compensation to the land owner and by so doing preserving the sanctity of private property and the right of owners of private property to seek judicial remedies upon infringement of their property rights (Emergency Powers (Resolution of Disputes Over Occupation of Rural Land) Regulations, 1984, S.I. 243 A of 1984).

24 Note 2 above.

25 *Supra*, pp.22–24 of the cyclostyled copy of the judgment.

26 See, generally, K. Kuria and J.B. Ojwang, "Judges and the Rule of Law in the Framework of Politics: The Kenyan Case", (1979) *Public Law* (254–281).

27 *Willy Mutunga v R* (Misc. Crim. App. No. 101, 1982, High Court of Kenya at Nairobi) (unreported).

28 The defence lawyers had cited the leading authority on bail, *Panju v R* (1973) E.A. 284.

protection of those engaged in activities that openly expose Zimbabwe to easy attack by the racist, neo-fascist regime in South Africa which has a lot of "friends" among ex-Rhodesians, mainly but not exclusively white, who are Zimbabwean citizens. The Kenyan case on the other hand is sad and dangerous in that the courts have virtually abandoned their independence to political leaders who are moving more and more towards neo-colonial fascism. In both cases, however, the courts are carrying out their tasks in defence of the ruling classes and the existing capitalist economic system.

The reason why the Kenyan courts have tended to play the tune of the political leaders much more than the Zimbabwean courts is that in Kenya those seeking protection from the courts are identified as enemies of the existing neo-colonial capitalist economy which both the judges and the executive organs of the State want to preserve. So united in purpose are the judiciary and the executive in Kenya on the question of suppressing progressive anti-imperialist, anti-capitalist resistance in any form that the executive only rarely uses preventive detention to silence resistance. Instead, the executive prefers to use the courts by bringing trumped-up charges against its intended victims.

Hundreds of Kenyans today languish in jails *as political prisoners* although the state alleges that they are simple criminals just because their incarceration is sanctioned through the courts.

It is important to point out then that where courts are not accountable to the popular masses there is greater danger that the courts will easily lose their adherence to the law and will be easily manipulatable by political leaders bent on perpetuating the unacceptable social system of neo-colonialism. In such circumstances, attempts to use the process of *habeas corpus, mandamus* and similar processes in order to ensure that individuals are punished only when clearly established cases are proved against them in courts of law become useful as political education exercises only. Whenever the state rejects these processes, the public educates itself on the nature of the regime and if such rejection does not accord with popular sentiments of the people, the regime in power gets rejected more and more by the people. Similarly, misuse of these processes to secure freedom to those bent on protecting and perpetuating the social system of exploitation and inequality can only bring disrepute to the courts and hence render independence to the judiciary a tool for promoting social and political injustices.

5. THE PROMOTION OF INDEPENDENCE OF THE JUDGES AND LAWYERS THROUGH ENSURING FAIRNESS OF PROCEEDINGS

One of the most challenging tasks for judges and lawyers in societies organized along capitalist lines who are concerned about their social relevance to the larger part of society who do not own and control the society's wealth, as we have observed in the introduction above, is how to dispense equal justice in a society where inequality is institutionalized and protected by law. The dilemma is faced daily by lawyers who as judges, prosecutors or defenders are caught-up

in cases where only one party in a dispute has legal representation. Can one claim to uphold independence that leads to equality of justice when the organization of the judicial process puts one in a position where they pit their professional legal skills against unrepresented persons? For the judge, is it possible or desirable to be independent in a case where one party has legal representation while the other side does not? Is it just to observe rules of judging a case purely on the basis of submissions by the parties to a case, whether civil or criminal, where one side has specialized legal representation and the other side does not?

It has been established beyond doubt that no justice is done in court where one party is represented by a legal professional while one side is not.[29] Indeed, even the philanthropic efforts to provide free legal aid through sometimes disinterested and poorly remunerated lawyers who are made to face lawyers whose pockets are filled with money from wealthy clients do not lead to equality of representation.

Given these conditions it ought to be clear to all lawyers that independence of their profession means little or nothing at all to the majority of the society when all they are doing is to demand "independence" that allows them to continue servicing inequality. Exercise of "independence" to serve a tiny minority in society is not what we should be promoting.

Indeed the only way to change and make courts and judicial processes just to the majority of society is to change the material conditions that create inequality; to restructure legal professions in such a way that private practice is discouraged; to make procedures and language simple and comprehensible to the people; to guarantee that all cases requiring legal assistance do get it; to involve the people in dispute settlement; to ensure that the content of law, that is, that the legal rights being defended, are not for purposes of protecting any form of oppression.

6. CONCLUSION

I have attempted in this contribution to reveal the class basis of the assumptions that underlie the doctrine of independence of the judiciary and legal profession. In doing so I have suggested that the doctrine requires re-evaluation given the revolutionary demands of the masses in our societies who have suffered for centuries under colonial capitalism and who, since independence, continue to suffer under neo-colonial capitalism that prevails in most of our societies in Africa. The capitalist system commoditizes virtually all material goods and social services. And, legal services have *not* been an exception.

Without undertaking major transformations in material conditions, institutions and ideological orientation, our quest for independence of judges and

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[29] See, Gutto, Note 3, above; J.S. Read, "The Advantage of Counsel" (1971) *Vol. 7(2) East African Law Journals*: Ilwacha, *Report on Legal Aid in Zimbabwe*, 1983 (unpublished).

lawyers can only mean independence to allow the anti-society work of lawyers to be perpetuated. The minority ruling class, however, are benefiting from the existing order of things and will necessarily oppose our efforts to join the masses and create new, more socially beneficial, conditions in the law and its administration. However, as Samora Machel said, we must choose which side we are on. I have chosen which side I am on and I have made my contribution from that partisan position.